No. 2745.

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff in Error,

vs.

FRANK R. STEWART,

Defendant in Error.

PETITION FOR A REHEARING.

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Filed this.....day of July, 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

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PETITION FOR A REHEARING.

To the Honorable, the Judges of said Circuit Court of Appeals.

The plaintiff in error, Southern Pacific Company, hereby respectfully petitions, pursuant to Rule 29 of this Court, that a rehearing be granted herein. The judgment of the United States District Court for the District of Arizona was affirmed by this Court by an opinion filed herein on July 3, 1916, written by His Honor Circuit Judge Gilbert, and concurred in by Their Honors Circuit Judges Ross and Hunt.

The rehearing is asked for on but one ground, which may be stated briefly as follows:

Plaintiff below sued for loss of and damage to livestock shipped over the rails of the Southern

Pacific Company, and its connecting carrier the Arizona Eastern Railway Company, from San Luis Obispo, California, on July 1, 1913, to Phoenix, Arizona. The livestock was shipped under *Live Stock Shipping Order Contracts and Bills of Lading,* which provided that:

> "In case any loss or damage shall have been sustained, for which first party is liable, demand or claim for such loss or damage will be made by second party on the Freight Claim Agent of first party, in writing, within ten days after the unloading of the livestock; and that, in event of failure so to do, all claims for loss or damage in the premises are hereby expressly waived, released, and made void."

The point made by this petition for a rehearing is that, in view of the interstate character of the shipment, and the provisions of the bill of lading above referred to, the plaintiff was without remedy.

It is respectfully submitted:

(1) That the record (p. 85) clearly shows that notice in writing within ten days was not given, but that it was withheld for nearly three months.

(2) That under the bill of lading and the Federal statutes, as construed by the United States Supreme Court, it was utterly incompetent for the carrier to waive such notice (a) expressly, or (b) by conduct, knowledge, receipt of oral notice, or negotiation.

(3) That therefore it is immaterial what the record facts are upon which waiver is found, because, if the carrier was not, from controlling reasons of public policy, permitted to waive the notice directly, this Court has no power, because of the same reasons of public policy, to enforce such waiver on the theory either of waiver or estoppel in pais.

It is further respectfully represented by this petitioner that in deciding, as this Court did, that the plaintiff in the Court below was relieved and released from giving the required ten days' notice, this Court based its opinion in that respect solely upon the state cases cited in its opinion, and failed to give proper and controlling weight to the provisions of the Federal statutes and to the decisions of the Federal Courts interpreting and applying such statutes, which solely govern this case.

We have, in addition, to submit for the consideration of the Court on this petition, certain decisions of the United States Supreme Court which were handed down after this case was submitted on oral argument, and which we claim should control the Court's determination of the instant case on a proper consideration of the record herein.

STATEMENT OF FACTS.

The portion of this Court's opinion which by this petition for a rehearing is questioned by us, is as follows:

> "The defendant urges that the Court below erred in refusing to charge as requested that the plaintiff could not recover for any loss or damage to the cattle, for the reason that he failed to make written demand on the defendant within ten days after unloading at the final destination, when he knew of all the damage to the cattle, or could, by the exercise of reasonable diligence, have known the same. The requested instruction was in accordance with

the defense pleaded in the defendant's answer. To that defense the plaintiff had replied that he was relieved from compliance with the provision as to notice in writing within ten days by the facts that on July 4, 1913, and at all times subsequent thereto, the defendant had full knowledge and notice of the injuries and damages to the plaintiff's cattle; that prior to reloading the cattle on that day, five of them had died, that the defendant found it necessary to provide an additional car in which to reload thirteen of the crippled and sick cattle, that at various points between Yuma and Phoenix the train officials in charge of the shipment received telegraphic inquiries from other officials of the defendant inquiring as to the condition and welfare of the cattle, that after arrival at Phoenix one of the crippled animals remained in the defendant's car for more than a week, that from the unloading of the shipment at Phoenix until October 21st of that year the plaintiff and the agents of the defendant and its connecting carrier were almost daily in communication relative to the damages sustained by the plaintiff, that the nature and extent of the injuries to the cattle which arrived alive were such as to render it impossible to determine the amount and extent thereof within the ten-day period, that a number thereof died many days after their arrival at Phoenix, as the result of such injuries, and that the defendant on many occasions prior to October 21st recognized the plaintiff's right to recover on account of his damages. There was proof tending to sustain all the facts so alleged in the reply. We think, therefore, that the Court below committed no error in instructing the jury that in view of the evidence, if they found it to be true, the plaintiff was relieved and released from giving notice within the ten days. *Cockrill* vs. *Mis-*

souri, K. & T. Ry. Co., 136 Pac. 322, and cases there cited; *Pierson* vs. *Northern Pacific Ry. Co.,* 61 Wash. 450; *Chicago, R. I. & P. Ry. Co.* vs. *Spears,* 122 Pac. 228; *Missouri, K. & T. Ry. Co.* vs. *Frogley,* 75 Kan. 440; *Adams* vs. *Colorado & S. Ry. Co.,* 113 Pac. 1010."

In our view of the case, as we have already indicated, it is entirely immaterial what knowledge carrier had of the condition of the shipment; what it did to save further loss; what oral negotiations it had with the plaintiff, or what recognition it made of the plaintiff's rights to some damages.

For that reason we will not analyze the testimony, contenting ourselves with saying that the statement of the testimony contained in this Court's opinion is as strongly favorable for the plaintiff as can be made from the record. Even so, we respectfully urge that what the defendant knew or did or said, or what the plaintiff *said,* cannot cure the lack of the required written notice.

FEDERAL CASES.

We come now to the line of Federal cases, only a few of which we shall refer to. We believe they justify the contention made here:

That it is against public policy for this Court to hold that by its knowledge or conduct the carrier waived the ten-day notice provision.

Phillips vs. *Grand Trunk Railway,* 236 U. S. 662, 667:

> "The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law, and to treat all shippers alike, would have made it illegal for the carriers, either by silence or express waiver, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. To have one period of limitation where the complaint is filed before the Commission, and the varying periods of limitation of the different States, where a suit was brought in a Court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others would be to prefer some and discriminate against others, in violation of the terms of the Commerce Act, which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier."

The Phillips case is referred to by District Judge Wade of the Southern District of Iowa in his ruling on motion for directed verdict in the case of *Theodore Olson* vs. *C., B. & Q. Ry. Co. et al.,* February 23, 1916. The action was against the C., B. & Q. Ry. Co., the Southern Pacific Company and the Santa Fe, to recover damages for injuries to and death of stock which had been originally shipped under special contracts *in the same form* as those involved in the case at bar. A full copy of the

opinion in the Olson case, which was unreported, will be found in the files of the Clerk of this Court in this case, having been filed since the oral argument. Says the Court, referring to the provision for notice:

> "And the Supreme Court of the United States has gone so far as to hold that the railroad company itself cannot waive such a provision in the contract, the reason being that all modern legislation is intended, so far as possible, to put everybody on exactly the same footing, and that one shipper should not have privileges another shipper did not have." (Citing 236 U. S. 662).

The facts in the Olson case are quite analogous to those in the present case.

Georgia, Florida & Alabama Railway Company vs. *Blish Milling Co.,* decided May 8, 1916, 241 U. S. 190:

In this case flour was shipped interstate under a bill of lading containing a provision that claims for loss, damage or delay must be made in writing to the carrier, etc., within four months after delivery, or, in case of failure to make delivery, within four months after a reasonable time for delivery had elapsed; and that unless claims were so made the carrier should not be liable. The defense was overruled. The Court held, citing numerous cases, that the question of proper construction of the bill of lading of an interstate shipment is a federal question, and that the multitudinous transactions of a

carrier justify the requirement of written notice of misdelivery of merchandise and claims against it, even with respect to its own operations. In this case the delivering carrier converted the shipment, which certainly was as effectual to impart notice to it of its obligations under the bill of lading as in the case at bar was the death of the five head of cattle in transit and the loading of the thirteen disabled cattle in another car to be transported from Yuma to Phoenix. Says the Court (p. 197):

> **"It is urged, however, that the carrier in making the misdelivery converted the flour and thus abandoned the contract. But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed. Chicago & Alton R. Co. vs. Kirby, 225 U. S. 153, 166; Kansas Southern Ry. Co. vs. Carl, supra; Atchison, Topeka & Santa Fe Ry. Co. vs. Robinson, 233 U. S. 173, 181; Southern Ry. Co. vs. Prescott, 240 U. S. 630. We are not concerned in the present case with any question save as to the applicability of the provision, and its validity, and as we find it to be both applicable and valid, effect must be given to it."**

We think the Blish case perfectly fits the present case. True, in the present case the carrier knew that certain animals had died while in its possession, and that the other animals were in a damaged condition. For the purpose of this applica-

tion for a rehearing we must assume that the carrier knew that that condition had been brought about by its own negligence. But it was moving this shipment under a bill of lading, the terms of which it could not waive or vary, and, as said by the Supreme Court in the Blish case, *supra,* it could not "*by its conduct* give the shipper the right to ignore these terms which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations." To do so would be to permit it to waive indirectly that which under the doctrine of the Phillips case, *supra,* it is not permitted to waive directly. To do so would be to open the door to favoritism among shippers. We submit that it is not sound public policy for Federal Courts to hold that by mere silence, or by negotiation, or by solicitous inquiry as to the condition of the shipment, a carrier may waive that provision which is intended not alone for its benefit but for that of the public by insuring equality of treatment of shippers.

In the Blish case, *supra,* finding that *written* notice had been given was upheld on the proof of a series of telegrams one of which specifically stated that claim was made for invoice value of the flour.

Southern Railway vs. *Prescott,* 240 U. S. 630:

> "It is also clear that, with respect to the service governed by the federal statute, the parties were not at liberty to alter the terms of the serv-

ice as fixed by the filed regulations." (Citing cases). "This is the plain purpose of the statute, in order to shut the door to all contrivances in violation of its provisions against preferences and discrimination. * * *

"And the question as to responsibility under the bill of lading is none the less a federal one, because it must be resolved by the application of general principles of the common law." (Citing cases).

Northern Pacific Ry. Co. vs. *Wall,* 241 U. S. 87:

In this case the view of the Montana Courts, that the notice of claim for damages required by live-stock contract might be waived by the carrier, is impliedly condemned by the Supreme Court, the decision, however, turning on the point that such notice may be given to a connecting carrier as well as to the initial carrier.

C. N. O. & T. P. Ry. Co. vs. *Rankin,* decided by the United States Supreme Court on May 22, 1916:

This case holds that where stock was shipped interstate under a limited-liability contract, the rights and liabilities of the parties depend upon Acts of Congress, the bill of lading, and common-law rules as accepted and applied in Federal tribunals, and that the provisions of the contract are to be considered at least as *prima facie* valid against the shipper, and consequently that the Court cannot hold them void as a matter of law, and permit recovery in violation of any provision.

Clegg vs. *St. Louis & San Francisco Railway Company,* C. C. A., 8th Circuit, 203 Fed. 971:

Here again was an action to recover damages for delay in delivering cattle shipped interstate under a livestock contract. The answer set up that the notice provided for in the contract was not given. Plaintiff sought to avoid failure to give notice by pleading that the General Freight Claim Agent, who had full authority to handle and adjust all freight claims, received notice of plaintiff's claim without objection as to the time of presentation, or the manner and form thereof, and that he negotiated with the plaintiff, both orally and in writing, on the subject of such claim, and that by reason thereof the defendant waived the notice provision. Says the Court:

> "We are clearly of the opinion that the eleventh provision in the contract above quoted, relative to giving notice, was a valid one, and the failure to give the notice fatal to defendant's right to recover." (Citing cases).
>
> "The provision in the contract that no agent of the company had any authority to waive, modify or amend any of the provisions of the contract, was also a valid provision, and the action of Leith, General Freight Claim Agent of the defendant, in simply negotiating with the plaintiff, was not a waiver of that provision of the contract."

In the case at bar we have merely: 1st, whatever knowledge the Southern Pacific Company had of the death of five of the cattle, and the condition of the

remainder; 2nd, inquiry by the conductor on instructions by unnamed superiors; 3rd, conversations with agents of the Arizona Eastern, in which a claim for damages was orally asserted; 4th, conversation or conversations with an unidentified person who said that he was a claim agent of the Southern Pacific Company; 5th, the first service of written, formal notice by letter of October 2, 1913, nearly three months after the shipment moved. These surely cannot be held to constitute a waiver or release.

It is clear that mere *conduct* by the carrier does not waive bill of lading provision for notice (Blish case, *supra*).

Kidwell vs. *Oregon Short Line,* C. C. A., 9th Circuit, 208 Fed. 1:

Here this Court holds that the notice provision in the livestock contract is a reasonable one, and further (page 3):

> "It is no compliance with such a provision to remark to a freight agent of the carrier along the line of the route that the shipper is going to put in a claim for damages. Nor is it a compliance to inform the agent at the place of destination that there will be a claim against the company for damages. To impart the information that a claim will be presented is not to present 'a claim for loss, damage, or detention.' It does not inform the carrier of the nature, extent, amount, or cause of damage. It gives no definite statement of facts upon which an investigation may be had, or which shows that an investigation is required."

While this Court in that case, in citing the Spears case (122 Pac. 228) impliedly is of the opinion that there may be circumstances to render the requirement of the notice negligible or impracticable, it does not appear that, as in the case at bar, the controlling effect of the Federal decisions forbidding the carrier to waive the notice, and holding that even conversion by a carrier would not make the notice negligible (Blish case, *supra*), were called to the attention of this Court.

We want also to call the Court's attention to the fact that the language of the Southern Pacific Company bills of lading here involved, as respects notice, is far more definite and comprehensive than in any of the cases so far referred to, except the Olson case, *supra*. Most of the contracts hitherto considered by the Courts have included damage but not loss. Some of such contracts so considered have required "notice" only, without saying what kind of notice it shall be. Many of such contracts—in fact most of them—have not specified the person upon whom notice shall be served. Many of such contracts, particularly those considered in the state cases, have required the notice to be presented within one day, which probably had its effect on the Court passing on the reasonableness of the contract, or on the question of whether notice had been or might be waived. All of these points are covered in the Southern Pacific form, which need not be again quoted.

Ordinary Principles of Waiver and Estoppel Inapplicable Here.

The opinion of this Court overlooks, we submit, two substantial distinctions between ordinary cases of waiver and estoppel and the case at bar. These distinctions may perhaps be better expressed by citations than in our language. They are:

> 1. "A party of full age, and acting *sui juris,* can waive a statutory or even a constitutional provision in his own favor, affecting simply his property or *alienable rights, and not involving considerations of public policy.*"
>
> 40 Cyc. 267, and cases cited.
>
> *Phyfe* vs. *Eimer,* 45 N. Y. 102, 104.
>
> 2. "No estoppel *in pais* can be created except by *conduct* which the person setting up the estoppel *has the right to rely upon,* and does in fact rely and act upon."
>
> *Bloomfield* vs. *Charter Oak Bank,* 121 U. S. 121-135.

Stewart had no "right to rely upon" the *conduct* of the carrier because under the Federal cases he could not have relied upon the carrier's formal, written waiver.

Many cases have gone elaborately into the distinction between waiver and estoppel, but it would serve no useful purpose in this case for us to expand this petition by indulging in academic reasoning on the question.

The outstanding question here is not whether, by virtue of an estoppel *in pais,* which implies both acts and reliance on those acts, or by waiver, which is a question of intention manifested in an unequivocal manner, the plaintiff was relieved from the necessity of carrying out the notice provision in the contract.

The question is, could the defendant, because of a public policy declared by Congress and upheld by the Courts, waive this provision directly? If he could not, we submit that by no acts, silence, knowledge or acquiescence on its part; by no solicitous inquiry by the carrier as to the condition of the livestock; by no tentative negotiation with plaintiff during the ten days, could the carrier waive a provision evidenced by tariff, the uniform enforcement of which is demanded by considerations of public policy and so declared by the Federal Courts.

We say that even if the board of directors of the Southern Pacific Company had during the ten days in question passed a resolution expressly reciting that the provision in the Stewart contracts respecting notice was thereby waived, the resolution would be a nullity. This is precisely what the Supreme Court means in the Blish case, *supra,* when it says that not even by conduct can the carrier waive a notice provision in a bill of lading.

It is elementary that a waiver must be made by one capable of binding himself.

A waiver, to be binding, must operate by way of estoppel, or amount to a promise supported by a valuable consideration.

Crandall vs. *Moston,* 50 N. Y. Supp. 145.

In *Libby* vs. *Haley,* 91 Me. 331, 39 Atl. 1004, the Court says, citing cases, that waiver is a voluntary surrendering of a right, and estoppel is the inhibition of asserting it from mischief that has been caused.

In *McCormick* vs. *Orient Insurance Co.*, 86 Cal. 260, the Court says that:

> "In strictness the term 'waiver' is used to designate the act, or the consequences of the act, of one side only, while the term 'estoppel *in pais*' is applicable where the conduct of one side has induced the other to take such a decision that he will be injured if the first be permitted to repudiate his acts."

> "Waiver involves a notion or an intention entertained by the holder of some right to abandon or relinquish instead of insisting on the right."

> *Fairbanks* vs. *Baskett,* 98 Mo. App. 53; 71 S. W. 1113.

Public policy, as declared by law of Congress and enforced by decisions of the Federal Courts, forbids the parties to a contract of shipment from varying its terms under any of the principles applicable to ordinary contracts which are not controlled by public policy. In ordinary contracts the parties may

by course of conduct waive their rights or estop themselves from enforcing particular provisions; but there is no reason for the application of the ordinary rules as to waiver or estoppel to a contract which the law declares shall be followed absolutely and according to its terms. Hence, in speaking of these contracts concerning interstate shipments, the Supreme Court says (Phillips case, *supra*) that the law makes it illegal for the carriers, either by silence or express waiver, to preserve to the shipper a right of action which the statute requires should be asserted within a fixed period; or to permit a carrier to plead the statute of limitations as against some and to waive it as to others, in violation of the law which forbids all devices by which such results can be accomplished.

The Federal cases above cited show that the bill of lading provision requiring notice to be given within a certain time is of equal dignity—as a limitation upon the right of a shipper to recover—with a congressional statute of limitations. There is no difference in principle between the congressional statute of limitations and the provision in the bill of lading. In the first case Congress has imposed conditions which must be observed by carrier and shipper alike, and which the carrier, as decided by the Supreme Court, is not permitted to waive. In the second case Congress has permitted the carrier, by filing tariffs with the Commission, to prescribe forms of contract known as bills of lading, or to

prescribe terms which are to be inserted in these bills of lading, and among these terms the carrier has power to prescribe the time within which and the manner in which and the person to whom claims for loss or damage against it must be presented. When these tariffs and forms are filed and, by acquiescence, approved by the Commission they have the effect of a Congressional Act. This statement requires neither citation nor elaboration.

While in the past there has been a contrariety of opinion among the state courts as to the reasonableness and enforceability of these provisions, they have been uniformly upheld by the Federal Courts. These provisions are in themselves equivalent to statutes of limitation, as they are made pursuant to a power delegated by Congress to the carrier, which power is necessarily so delegated because of the varying conditions in different parts of the country, and because of the necessity of flexibility in commercial transactions.

It may be that the enforcement of this rule in the case at bar will work some hardship on the plaintiff. That, however, is a question apart from this case.

As said by Mr. Justice Hughes in *Louisville & Nashville R. Co.* vs. *Maxwell,* 237 U. S. 94, on page 97:

> "Under the Interstate Commerce Act the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged

with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. *This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.*"

REVIEW OF STATE CASES RELIED ON BY THIS COURT.

In view of what we have said in the foregoing, it is perhaps unnecessary to analyze the state cases cited by this Court in its opinion. We, however, shall do so for the purpose of pointing out that in none of those cases was the Federal question raised, and, apparently from the decisions, in none of those cases did the Court consider the effect of the Acts of Congress and the Federal decisions in prohibiting waiver of a notice clause in a bill of lading. But we take the position squarely that even if these state courts had considered the Federal question and had decided that the Federal statute did apply, their decisions even then would not control or weigh against the decisions of the highest court in the land.

The five cases cited by the Court are of course only a few of the many cases decided by state courts, in some of which similar provisions in bills of lading

were held to be waived by conduct such as that of the carrier in the case at bar, and in others of which it was held that such conduct did not amount to a waiver. We will not take the time nor impose on the patience of the Court by attempting to collect a mass of cases decided in state courts in opposition to the principles announced in the five cases cited by this Court. We have only to say that in our view it would make no difference if all of the state courts' decisions had been in entire consonance with every principle announced in the five cases cited by this Court, and that even then the decisions of the United States Supreme Court on the Acts of Congress would still override and control the views of state tribunals.

Typical of the line of state cases in which the Court clearly perceived the difference between that which a man may waive either directly or on the principle of estoppel, and that which he may not waive because public policy forbids it, is the case of

Pennsylvania Railroad vs. *Titus,* New York Court of Appeals, September 28, 1915; 216 N. Y. 17; 109 N. E. 857.

This was a case where the carrier had mistakenly charged the defendant less than the correct amount of the freight according to tariff rate. The freight moved on a bill of lading providing that the owner or consignee should pay freight, and that in accepting the bill of lading the shipper, owner and con-

signee agreed to be bound by all of the stipulations of the bill. The consignee had remitted to the consignor the net proceeds of the sale of the shipment, so that if the mistake of the carrier's agent was unavailing to the consignee the loss would fall upon him. The Court says (page 858):

> "The defendant, therefore, became bound to pay to the plaintiff the freight charges—not those charges as erroneously or illegally computed by the plaintiff or himself, but the lawful and correct charges. *If the amount of them were subject to the determination of the plaintiff, it might of course remit them in part, or perhaps estop itself from collecting a balance.* We have no concern here in regard to such hypothesis. The one and only lawful and correct freight rate was that set forth in the schedule or tariff filed in the office of the Interstate Commerce Commission and duly published and posted. The United States statutes, known as the Interstate Commerce Act (Act February 4, 1887, c. 104, 24 Stat. 379), made that rate arbitrary, immutable by the agreement, mistake, or artifice of the parties, and not to be deviated from. The consignor, consignee, and carrier were alike charged with full knowledge of it and its inescapable force, and it was the rate which the defendant agreed to pay in accepting the goods. *Central R. Co. of N. J.* vs. *Mauser,* 241 Pa. 603, 88 Atl. 791, 49 LRA. (N. S.) 92; *N. Y., N. H. & H. R. Co.* vs. *York & Whitney Co.,* 215 Mass. 36, 102 N. E. 366; *Pennsylvania R. Co.* vs. *Crutchfield,* 55 Pa. Super. Ct. 346; *L. & N. R. Co.* vs. *Maxwell,* 237 U. S. 94, 35 Sup. Ct. 494, 59 L. Ed. 853; *U. P. R. Co.* vs. *American Smelting & Refining Co.,* 202 Fed. 720, 121 C. C. A. 182.

> "Obviously, the payment of a part of the correct amount did not fulfill or release performance by the defendant of his contract. *The record does not present a question of estoppel on the part of the plaintiff, which could not, by its act, intentional or unintentional, relieve the defendant or itself from the compulsory direction of the statutes.* The fact that the defendant had remitted to the consignor the net avails of the sale of the peaches is immaterial."

The cases cited by this Court in its opinion in the case at bar are:

Cockrill vs. *Missouri, Kansas & Texas Railway Company,* 136 Pac. 322 (Kansas):

This was a shipment of cattle from Parker, Kansas, to Kansas City, Missouri. Some of the cattle died and others were crippled in transit. The Court held that as the Company inspected and made a record of the condition of the shipment at the time of delivery, it could have had no benefit by receiving a written notice of what it already knew respecting the dead and crippled cattle. Four Kansas cases and no Federal cases are cited in support of this conclusion. The Federal questions raised in this petition were not raised in the Cockrill case, so far as the opinion shows.

Pierce vs. *Northern Pacific Railway Company,* 61 Wash. 450:

This was an interstate shipment of horses on a livestock contract. As in the Cockrill case, the Federal questions were not raised. Notice in writ-

ing of claim for damages was required by the contract. The Court held that where the nature and extent of the injuries to the animals surviving could not be ascertained with any degree of certainty within the limit of time provided in the contract, the stipulation was unreasonable and inapplicable, and that the stipulation had no application to the animals which died before their arrival at the place of destination. This is in direct conflict with the Federal decisions we herein cite.

Chicago, Rock Island & Pacific Railway Company vs. *Spears,* 122 Pac. 228 (Oklahoma):

Here the cattle moved interstate under a livestock contract providing that for the recovery of "damages for injury to or detention of livestock, or delay in transit," notice in writing should be served within one day after delivery of stock at destination. The Court held that as to dead cattle they did not come within the terms of the contract requiring notice of claim for *damages* to be given. It held also that the defendant carrier had waived the condition of notice because at the time the cattle were received it was impossible to know the full extent of the injuries. The contract provision was that notice should be served within one day after the delivery of the stock. Here again no Federal question was raised, and the considerations upon which stress is now put by the Federal Courts were apparently not before the Court.

Missouri, Kansas & Texas Railway Company vs. *Frogley,* 75 Kan. 440 (89 Pac. 903):

This case is cited in the Cockrill case *supra,* and apparently was decided on the ground that the stipulation in the contract requiring notice was against public policy if the loss of the animals was due to the negligence of the carrier. It also held that because the animal died while in the company's possession the company had the opportunity to ascertain the extent of the loss. Here again the Federal question was not raised.

Adams vs. *Colorado & Southern Railway Company,* 113 Pac. 1010 (Colorado):

This was an intrastate shipment, in which the provision of the contract that an action should be brought within ninety days was held to be unreasonable and void. It was also held that the railroad was estopped from availing itself of the ninety-day clause because it had verbally agreed with claimant that if payment of the claim was finally refused it would waive compliance.

Uncertainty of Amount of Damage Sustained No Excuse for Failure to Give Written Notice Within Ten Days.

In the decisions of some of the State Courts, particularly those of Missouri, Oklahoma, Kansas and Colorado, which are the most extreme of the states which have refused to recognize the validity of notice provisions in the bill of lading, there appears

here and there the idea that because, in some cases of livestock which has been injured in transit, the damage to the stock cannot be ascertained definitely within the time limited by the bill of lading for presentation of notice, therefore in some mysterious way the provision for the notice is, and ought to be in reason, definitely postponed until the damage to the stock is capable of being itemized and a claim presented accordingly. On principle we submit that that cannot be true, because the shipper knows, or is presumed to know, that under a contract such as that involved in the present case he must present his claim for loss or damage within a certain specified time—in this case ten days. If he knows, as the plaintiff Stewart knew in the present case, that his shipment was short five cows when it reached destination, that is a case of *loss* which is specifically covered by the contract, and there is no possible excuse for his failing to present a written claim as prescribed by his contract. If he knows, as Stewart knew in the present case, and says he knew, as abundantly appears from the evidence, without conflict, that the remainder of the shipment had reached destination in a *damaged* condition, the fact that the extent of the damage was uncertain, and perhaps unascertainable for some time, is no better reason for failure to carry out the bill of lading provisions. In other words, Stewart knew, according to his own testimony (Record p. 84), that when the cattle reached Phoenix five had died and the others were "in a badly stove-up condition."

What the result of that condition would be, assuming that he knew and we knew that it was due to our negligence, is something that he could not foretell, nor could we foretell. But we submit that it was certainly incumbent upon him to serve notice in the formal way contemplated by the bill of lading, to the effect that we would be held responsible for whatever damage resulted to him as the result of our negligence, thus, as all the cases hold one object of the clause to be, giving us the opportunity of investigating and, to the extent to which we might be permitted to do so, endeavoring to remedy the effects of whatever negligence was chargeable to us.

Apparently, from the record, he made no claim for these uncertain damages, but merely said to the freight agent of the Arizona Eastern at Phoenix that he had a claim for damages against the Southern Pacific. That might well have been for the five cows that were lost. He was not definite in any respect, and did not become definite until October 2, nearly three months after the receipt of the shipment, when he did file a claim for this damage to the cows which were alive when they reached Phoenix, and which he says even at that time was not fully ascertainable. In other words, the fact that some damage had been sustained by the cows that were alive when they reached Phoenix was apparent to Stewart, as he admits, as well as to everyone else, and yet, ignoring the bill of lading

provision, he submitted no claim therefor until nearly three months later.

Suppose that we knew that the cows had reached Phoenix in a damaged condition, and that we had been negligent: The ten days go by without a written claim being filed as provided by the bill of lading; it then would be entirely reasonable for the railroad company to assume that the animals may have recovered, or that the damage may not have been such as might reasonably be expected as a consequence of admitted negligence, or that, even if the shipment suffered depreciation in market or intrinsic value, the consignee had nevertheless sold them for what would have been their fair market value, but for the carrier's negligence, and therefore either might not care to claim a fictitious damage, or might be satisfied with the result of his sale, thus indefinitely postponing and cutting off our investigation.

Or, he might have sold the damaged cattle for more than $30 per head, the amount of the limited liability, in which event claim would have been futile.

Under these circumstances, therefore, the clause in the bill of lading providing for the ten-days notice—looking at the case in its most favorable aspect for the plaintiff below—either meant what it said, or meant nothing. It either meant that for an apparent, but prospective and unascertained

damage the plaintiff might indefinitely delay presentation of claim, or that, having such evident reason to anticipate such damage, he must have presented his claim therefor within the time prescribed by the bill of lading.

The reasoning of the State decisions cited in this Court's opinion does not hold together.

Moreover, it is directly opposed to Federal statutes and decisions.

The only safe course to follow in the case of an interstate shipment is to hold the shipper and carrier strictly to the provisions of their contract.

That is the only course justifiable under the Federal cases we have cited. Certainly no Court would hold that if Stewart had in writing and within the ten days stated that damage had accrued to the cattle which reached Phoenix alive, but that he could not determine at that time the amount of the damage, we could thereafter plead a lack of certainty or itemization in the claim so filed.

Apparently, he chose to leave the matter in the air until it suited his convenience, nearly three months later, to file a claim which he should have filed within ten days after July 5, 1913.

IN CONCLUSION.

It is respectfully submitted, therefore, that in view of the foregoing and especially in view of the very recent Supreme Court decisions now called to Your Honors attention, a rehearing herein should be granted on the question of whether or not the plaintiff below was relieved from the obligation to give notice as prescribed by the bill of lading under which the interstate shipment moved, it being conceded that he did not in fact give such written notice.

In the event this petition be granted we do not waive the other points for reversal made by plaintiff in error, but we believe the point we make on this petition to be sufficient to dispose of this case.

Dated July 18, 1916.

Respectfully submitted,

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